"74. (i) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

The general purpose of the law is to give compensation, that is to put the plaintiff in as good a position as he would have been had the defendant performed the contract and the law speaks of compensation and not damages. Therefore the plaintiffs must show that they have suffered some loss or damage before compensation can be awarded. The plaintiff's contention, with which I agree, was that they suffered loss and the loss was the loss of bargain which they would have made if there was no breach — the loss being the difference between the sale price of the car and the price at which the car was eventually sold. The plaintiff contends (and the defendant is not here to refute it) that such make of car is not readily sold in the market and from past experience of the company only three to five units could be sold per month.

In *Lee Heng & Co.* v. *C. Melchers & Co.*[1] it was held that where the contract relates to goods for which there is a market the measure of damages is the difference between the contract price and the market price at the contracted date of delivery.

In *Lee Hin* v. *Mohamed bin Abubakar* [2] it was held that the damage which naturally arose from the respondent's breach was the plaintiff's loss of bargain, the measure of which would normally be the difference between the market value and the contract price. In the present case it was the plaintiff's contention that there was no available market.

In *Thompson Ltd.* v. *R. Robinson Ltd.*[3] the question as to what is an available market was considered. There the defendants agreed to purchase from plaintiffs a Standard Vanguard motor car and later repudiated the contract. The plaintiffs returned the car to their suppliers who did not seek compensation. The plaintiffs claimed damages for the breach of the agreement. It was held that the plaintiffs were entitled to be compensated for the loss of the bargain to the extent of the profit which they would have made, because the plaintiffs had, by reason of the breach of the contract, sold one motor car less than they would otherwise have sold. Upjohn J. said:—

"Had the matter been *res integra*, I think I should have found that an 'available market' merely means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold and that there was a demand sufficient to absorb readily all goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of.

I therefore agree that on the basis of the above-quoted cases the plaintiff is entitled to be compensated for the loss of profit of $1,312.31 i.e. $6,390 less $600 discount less $4,477.69 being the actual resale price of the car.

Consequently there will be an award for the plaintiff of $1,312.31 as compensation for breach of the agreement.

Order accordingly.

Solicitors: *Chooi & Co.*

RE CHONG AH KWAN CONSTRUCTION CO.; *EX PARTE* BAN AIK KEE CO.

[O.Bk.J. (MacIntyre J.) March 3, 1966]

[Ipoh — In Bankruptcy No. 77 of 1965]

Bankruptcy — Petition — Notice — Opposition to petition — Bankruptcy Rules, rules 107, 215 and 216 — Bankruptcy Ordinance, 1959, ss. 5(1), 6(7), 47 & 131.

The petition for bankruptcy in this case was opposed on the following grounds: (a) that the bankruptcy notice was bad in law as it did not state the name of the partner or partners of the judgment creditor firm; (b) that the bankruptcy petition was bad for want of an accompanying affidavit verifying the concurrence of all the partners of the judgment creditor firm to the institution of the bankruptcy proceedings; (c) that the bankruptcy petition was no longer maintainable by virtue of the acceptance by the judgment creditors of a sum of $2,000 on account of the judgment debt; (d) that the service of the petition by substituted service was not properly effected as the copy posted was not signed by the petitioner.

Held: (1) the bankruptcy notice in this case contained the name and business address of the judgment creditors and there was no authority for the contention that the notice was bad for failure to specify the name of the partner or partners of the firm;

(2) rule 215 of the Bankruptcy Rules which requires an accompanying affidavit does not apply to legal proceedings instituted by a firm in its own name as was done in this case;

(3) as rule 216 of the Bankruptcy Rules provides that any one partner may sign a bankruptcy petition presented by a firm the argument that all the partners should have signed the petition must fail;

(4) in this case the petitioning creditors, who were aware of the act of bankruptcy, could not have acquired a valid title to the sum of $2,000 handed over to them and therefore notwithstanding the payment of $2,000 by the debtors to the creditor the debt due and owing was still the sum of $10,988.80 as mentioned in the petition;

(5) that the service of the petition in this case was valid as the copies of the petition were sealed, though not signed, but even if they should have been signed, the omission to do so was an irregularity which could be cured by section 131 of the Bankruptcy Ordinance.

Cases referred to:—

(1) *Buckland and others, Assignees* v. *Newsame* 1 Tauton 919; 127 E.R. 477.

(2) *Ananta Kumar Saha v. Sadhu Charan Saha Poddar* A.I.R. 1926 Cal. 234.

(3) *In re Bagley* [1911] 1 K.B. 317.

(4) *In re Child* [1892] 2 Q.B. 77.

(5) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank Ltd.* [1906] 2 Ch. 444.

(6) *Au-Yong* v. *Dicum & Anor.* [1963] M.L.J. 349.

BANKRUPTCY.

S. A. Lingam for the judgment creditors.

N. Sharma for the judgment debtors.

Cur. Adv. Vult.

MacIntyre J.: By a notice dated the 31st of January 1966 the sole proprietor of the judgment debtor firm herein gave notice of his intention to oppose this bankruptcy petition.

The grounds for opposing the petition are set out in the affidavit of Chong Ah Kwan dated the 31st of January 1966 but counsel for the judgment debtor, in the course of the hearing of this application, abandoned the grounds mentioned in paragraphs 3 and 4 thereof and relied only on the following grounds, namely:—

(a) That the bankruptcy notice on which the petition is grounded is bad in law in that it did not state the name of the partner or partners of the judgment creditor firm to whom the debt should be paid;

(b) That the bankruptcy petition itself is bad for want of an accompanying affidavit verifying the concurrence of all the partners of the judgment creditor firm to the institution of the bankruptcy proceedings;

(c) That the bankruptcy petition is no longer maintainable by virtue of the acceptance by the judgment creditors of a sum of $2,000 to account of the judgment debt on the 6th of December 1965 after the presentation of the bankruptcy petition; and

(d) That the service of the petition by substituted service was not properly effected as the copy posted outside the judgment debtors' residential-cum-business premises was not signed by the petitioner and the copies posted on the notice board of the High Court and the Magistrate's Court Ipoh, respectively, were not sealed copies.

With regard to ground (a) no authority was cited in support of the contention that the bankruptcy notice was bad for failure to specify therein the name of the partner or partners to whom the debt should be paid. The bankruptcy notice in the present case contains the name and business address of the judgment creditors who are a firm and in my opinion the information given in the notice is sufficient to enable the debtors to know to whom and where to pay the debt. In fact, the judgment creditors seemed to have experienced no difficulty in paying a sum of $2,000 to the judgment creditors after the presentation of the bankruptcy petition.

Again, I find no substance in the contention that the petition is defective for want of an accompanying affidavit verifying that all the partners of the judgment creditors had concurred in filing the bankruptcy proceedings. Under rule 215 of the Bankruptcy Rules an accompanying affidavit is required only where proceedings are instituted by an authorised official or agent of a company or a co-partnership. The rule does not apply to legal proceedings instituted by a firm in its own name as was done by the judgment creditors herein.

It was also contended that the petition is defective because it was signed by only one of the two partners of the judgment creditors. In support of this argument, the decisions in *Buckland & Others. Assignees,* v. *Newsame* [1] and *Ananta Kumar Saha* v. *Sadhu Charan Saha Poddar* [2] were cited.

Now in the former case the debt was founded on a bond executed by the debtor in favour of one Buckland and another person jointly but the bankruptcy petition was issued by Buckland alone. Since bankruptcy proceedings are to be founded on a legal debt it was held necessary that both the joint bondholders should concur in taking the proceedings.

In the Indian case, the insolvency petition was grounded partly on an act of bankruptcy in respect of a judgment debt passed in favour of the petitioning creditor and other persons jointly. The court held that "so far as the decree for Rs. 5,700 is concerned,.....as the respondent is not the only person entitled to the benefit of the decree he is not entitled to utilise this debt upon which to found a petition for adjudication."

In the present proceedings the judgment debt is not owed to a number of persons who had sued jointly but to a firm which represents all the partners and had sued as such; and since rule 216 of the Bankruptcy Rules provides that any one partner may sign a bankruptcy petition presented by a firm the argument that all the partners should have signed the petition must fail.

It was further urged upon me that the petition herein was no longer tenable since after its presentation, the petitioning creditors had accepted payment to account of the debt due of a sum of $2,000 paid by the judgment debtors. I was asked to follow the unreported decision of Neal J. in Ipoh Bankruptcy No. 73 of 1962 wherein he was said to have set aside the bankruptcy notice on the ground that the amount for which the notice was issued exceeded the amount then due on a judgment debt by ten dollars. I have since seen the note made by Neal J., which merely indicates that the reasons for his decision are to be found at page 35 of *Williams* on Bankruptcy. It is clear that Neal J. relied on *In Re Bagley* [3] in which it was decided that a bankruptcy notice can only be issued for the amount for which the creditor is entitled to issue execution; and on *In Re Child* [4] where the court held that if a part of the judgment debt had been paid, the notice can only be issued for the balance.

I fail to see how a payment made to account of the debt subsequent to the presentation of the petition could vitiate it unless it be that the

amount of the debt, in consequence thereof, was reduced to less than five hundred dollars which is the minimum amount in respect of which a bankruptcy petition may be presented by virtue of the provisions of section 5(1)(a) of the Bankruptcy Ordinance. Even then it would appear that the approval of the court must be obtained in view of section 6(7) which reads: "A creditor's petition shall not after presentation be withdrawn without the leave of the court." In certain circumstances the court may quite conceivably refuse to approve the payment in the interest of the general body of creditors.

The conditions on which a creditor may petition are prescribed by section 5(1) of the Bankruptcy Ordinance. Briefly, the conditions are that:—

(a) The debt owing should not be less than five hundred dollars;

(b) The debt is a liquidated sum payable immediately or at some future date;

(c) The act of bankruptcy on which the petition is grounded occured within six months before the presentation of the petition; and

(d) The debtor is domiciled in Malaysia etc.

Now the payment of a sum of $2,000 to account of $10,998.80 cannot be said to have in any way contravened condition (a) above. Provided that the other three conditions, in regard to which there is no dispute, have been complied with, the judgment creditors are entitled to a receiving order on the petition on proving the debt as required by section 6(2) of the Ordinance. Alternatively, the judgment creditors are entitled to ask for a receiving order on the implied admission by the judgment debtors that the balance of the debt amounting to $8,998.80 is still due and owing. The court has a discretion to refuse to make a receiving order if it thought that some material particulars had been suppressed or that the petition had been brought *mala fides* but in this case the affidavit verifying the facts mentioned in the petition cannot be impeached since the payment was made after the presentation of the petition.

It further appears to me that the validity of a bankruptcy petition presented in compliance with the provisions of section 5(1) of the Ordinance cannot be vitiated by the payment or acceptance of any sum of money to account of the debt, by reason of the fact that a debtor who commits an act of bankruptcy cannot give a valid title to any of his assets which he may transfer or hand over in full or part satisfaction of his debt to a creditor with notice of the act of bankruptcy, till after the expiration of six months from the date of the act of bankruptcy, provided that in the meantime a receiving order had not been made against him.

Now the bankruptcy notice in the present proceedings was issued for the amount of $10,988.80. The act of bankruptcy was committed on the 7th of September 1965. The petition was presented on the 6th of October. An order for the substituted service of the petition was made on 3rd December. The sum of $2,000 was paid on the 6th of December. Substituted service of the petition was effected on 17th December and the service became effective on 31st December. The six months period from the act of bankruptcy will only expire on the 7th of March 1966.

Section 47(1) of the Bankruptcy Ordinance lays down a rule that when a debtor is adjudicated a bankrupt, the bankruptcy shall deem to have relation back to and to commence at the time of the act of bankruptcy on which the receiving order was made. The section also lays down the rule that when a bankrupt is proved to have committed more than one act of bankruptcy, then the bankruptcy shall be deemed to have relation back to and commence at the time of the first of the acts of bankruptcy proved to have been committed within 6 months next preceding the date of the presentation of the bankruptcy petition.

The provisions of this section are the same as of section 43 of the English Bankruptcy Act of 1883 except that under the English Act the period within which a bankruptcy petition may be presented is only three months as against our six.

Now the question as to whether a secured creditor who had had notice of an act of bankruptcy can refuse to accept tender of the amount due and owing within a period of 3 months of the date of the act of bankruptcy was considered in *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*,[5] and it was held by the Court of Appeal, reversing the decision of the lower court, that a secured creditor was not entitled to receive payment of the debt in these circumstances. The reason for so holding was given by Fletcher Moulton L.J. who delivered the judgment, on behalf of the full court, in the following words:

> "The arguments in this case have raised important and difficult questions involving a consideration in its most general form of the effect of the provisions of section 43 of the Bankruptcy Act, 1883, by virtue of which the title of the trustee in bankruptcy relates back to the earliest act of bankruptcy committed by a bankrupt within a period of not more than three months prior to the presentation of the bankruptcy petition.....For the purpose of deciding this point it is necessary to examine carefully the exact legal position of a man who has committed an act of bankruptcy under the statutes at present in force. Until commission of the act of bankruptcy he was, of course, the beneficial owner of whatever assets he possessed, but by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months

of the date of the act of bankruptcy which leads to a receiving order being made. If such receiving order be made the whole of the assets vest in his trustee as from the date of the act of bankruptcy. He is, therefore, in the position that should such a contingency occur he is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed either by a receiving order or by lapse of time, he has no right to deal with those assets that were in his hands, and can give no title in them to any transferee with notice. Similarly, with regard to the debts and other choses in action which form part of his estate, he cannot collect them or give a valid discharge for them, and anyone making a payment with notice of the act of bankruptcy does so at his peril."

The judgment debtors herein, at no time relevant to the issues in this application were in a position to deal with their assets or to confer any title to the assets they gave away. Nor could the petitioning creditors who were aware of the act of bankruptcy have acquired a valid title to the money handed over to them. In the result, I must hold that, notwithstanding the payment of $2,000 by the debtors to the creditors herein, the debt due and owing is still $10,983.80 as mentioned in the petition.

The last point I have to consider is in regard to the question of the validity of the service of the bankruptcy petition. It was contended that the service was bad because the copy of the petition posted on the outer door of the judgment debtors' premises was unsigned and the copies posted on the notice board of the Ipoh High Court and Magistrate's Court, respectively, were unsigned and not sealed.

The copy of the petition which was posted outside the outer door of the debtors' premises was shown to me and I was satisfied that it was sealed but unsigned.

In regard to the copies posted on the notice board of the courts, Chong Ah Kwan the sole proprietor of the judgment debtors in his affidavit of the 31st of January 1966 states:

"I have, since the sighting of the said copies of the bankruptcy petition caused an inspection on the notice board of the High Court and the Magistrate's Court, Ipoh, and have been advised that copies of the petition posted there were not sealed copies."

In reply to this allegation, Khor Kim Teik the managing partner of the judgment creditors in his affidavit dated the 12th of February 1966 states in paragraph 8:

"I deny that the copy of the bankruptcy petition posted outside premises No. 161 Kampar Road, Ipoh, was unsigned or that the copies of the bankruptcy petition posted on the notice board of the high court and the magistrate's court, Ipoh, were not sealed copies.'

Whatever may be the truth, it is apparent that Chong Ah Kwan had relied on information obtained from an undisclosed source for the statement that the copies posted on the notice board were unsealed. This evidence is therefore inadmissible and I have no reason to believe that the Bankruptcy Rules were not strictly complied with.

Now, Rule 107 of the Bankruptcy Rules requires that "a creditor's petition shall be personally served by delivering to the debtor a sealed copy of the filed petition." The simple meaning of this is that what is required to be served is not a signed copy of the petition but a sealed copy. Nowhere in the rule is it stated that the sealed copy for service should be signed by the petitioner. Rule 108 provides that where personal service could not be effected, the petition shall be served "in such manner as the court may direct and that such petition shall then be deemed to have been duly served on the debtor." The order for substituted service herein made by the Registrar reads:

"*IT IS ORDERED* that the creditors' petition herein be served on the judgment debtors by way of substituted service by posting copies of same together with a copy of this order on the outer door of the premises No. 161, Kampar Road, Ipoh, the abode of the judgment debtors, the notice board of this Honourable Court and at the magistrate's court, Ipoh, and that such service be deem good and sufficient service....."

It is therefore clear that by posting a sealed but unsigned copy of the petition, neither the order of the registrar nor any mandatory provision of law had been infringed. But even if it is assumed for argument's sake that the service copy of a petition should be signed, on the authority of *Au-Yong* v. *Dicum & Another*,[6] the omission to do so would not be an illegality but only an irregularity which could be cured by section 131 of the Bankruptcy Ordinance.

The application before me is therefore dismissed with costs and a receiving order will be made on the petition.

Order accordingly.

Application dismissed.

Solicitors: *S. A. Lingam; N. Sharma.*

HAJI WAN OTHMAN & ORS. v. GOVERNMENT OF THE FEDERATION OF MALAYA

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ong Hock Thye F.J.) March 7, 1966]

[Penang — Federal Court Civil Appeal No. 22 of 1965]

Pensions Ordinance, 1951 — Pensions Regulations, 1951, Regulations 5 and 15 — Exercise of option under regulation 15 — Whether person can claim full pension after expiry of ten years.

The appellants in this case had exercised their option under regulation 15 of the Pensions Regulations, 1951, to receive a pension at the rate of three-fourths of such pension together with a gratuity equal to ten times the amount of the reduction so made in the pension. Having outlived the period of ten years they claimed that they were entitled to full pension after the expiry of the